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No. 75-658

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IN THE

# Supreme Court of the United States

October Term, 1975

CHARLES COLES DIGGS, *et al.*,
*Petitioners,*

v.

CIVIL AERONAUTICS BOARD

and

SOUTH AFRICAN AIRWAYS,
*Respondents.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners submit this Reply Brief in support of their petition for a Writ of Certiorari.

The Brief in Opposition of Respondent Civil Aeronautics Board (CAB) states, "[t]he Board concluded that discrimination on flights within South Africa should not be considered . . . ." and "[p]etitioners' assertion that the Board found that SAA does

not discriminate on flights within South Africa without entertaining their evidence in that regard . . . is inaccurate." (Brief of Respondent CAB 3 and n. 2).

Respondent's statements notwithstanding, the record before the Court clearly establishes that findings on the issue of non-discrimination on SAA's continuation flights in South Africa and at SAA's facilities used by these flights were made by the Board and petitioners' proffer of evidence on these issues was rejected. The Administrative Law Judge (ALJ) in this case took evidence from respondent SAA's witness on the absence of discrimination against Americans on SAA's internal connecting flights in South Africa and at facilities utilized by these flights. Further, he made findings of non-discrimination against Americans on these matters. (Pet. 6). The Board in its opinion specifically noted that it "adopts as its own the *findings*, conclusions, and recommendations of the Administrative Law Judge. . ." (Emphasis supplied) (Pet. 6a). The ALJ's opinion was appended to the Board's opinion, (Pet. 6a), and submitted to the President. From the outset of this case petitioners sought repeatedly, but without success, to introduce evidence on these questions. (Pet. 5-8).

The Board's acceptance of SAA's evidence and subsequent findings on the issues of discrimination on SAA's internal connecting flights and facilities used by these flights in South Africa – issues on which petitioners attempted without success to introduce evidence – raises a clear question of procedural due process under the rule enunciated in *Northeast Airlines, Inc. v. CAB,* 345 F.2d 484 (1st Cir. 1965). The opinion of Chief Judge Aldrich in the *Northeast* case, in which Judges Burger and Maris joined, holds that basic principles of due process mandate that parties contesting evidence submitted in a CAB pro-

ceeding be given an opportunity to submit rebuttal evidence even if the material in dispute is not relevant to the challenged Board decision. The Court held:

> "It is to us crystal clear that as soon as it (the Board) elected to look at such matters it could not pick and choose, at least to the extent of denying an objecting party the rights guaranteed . . . to rebut not only those matters it looked to, but also the inferences which were sought to be drawn therefrom. Due process could permit no less." *Northeast Airlines, Inc. v. CAB, supra,* 345 F.2d at 486.[1]

The Brief of Respondent CAB avoids the procedural due process issue of this case, first by ignoring the fact that SAA submitted evidence of non-discrimination on its internal connecting flights and services in South Africa, and then by erroneously stating that no findings were made on these subjects by the ALJ and the Board. The Brief of Respondent SAA fails to address this essential element of the case.

## II

Respondent SAA's assertion that the criteria for non-justiciability set out in *Baker v. Carr,* 369 U.S. 186 (1962), would bar review of the Board's action recommending SAA's route to the President is simply incorrect. The

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[1] The conduct of the ALJ and the Board in the instant case is, if anything, more egregious than the actions declared unlawful in Northeast, since here the ultimate issue at stake involves racial discrimination rather than commercial considerations.

final authority of the President is not at issue in this case; it is the illegal actions of the Board which petitioners contest. A court order remanding this case for the introduction of petitioners' rebuttal evidence would neither create a risk of embarrassment to the United States, nor would it express a lack of respect for another branch of government, nor infringe upon a commitment made to another political department. Rather, it would merely assure the President's ability to reach a decision on SAA's permit application with a full and accurate statement of facts before him.[2] Once presented with a proper record, it is conceivable that the President might conclude that foreign affairs considerations required the issuance of SAA's route despite the presence of racial discrimination. Should the President approve a correctly processed Board recommendation, the criteria of *Baker v. Carr* might pose substantial barriers to judicial review.[3]

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[2] The fact that the President may not have been influenced by erroneous statements of non-discrimination or that evidence of general discrimination in South Africa may have been presented to Congress or the Executive Branch in the past is immaterial to this case. Petitioners do not ask this Court to decide whether evidence of discrimination would or would not influence the President's determination of SAA's application. Rather, the Court's responsibility is to assure that the procedures by which a record is created for the President comport with due process.

[3] In any case, even the ultimate judicial relief required in this case under the Constitution should petitioners prevail might give no offense to Executive prerogative in the area of foreign affairs. For example, petitioners have suggested below the possible requirement of notice to black American passengers on SAA flights that they will face racial discrimination on continuation flights and at SAA facilities in South Africa.

## III

Although both respondents refer to the judicial authorities which note a distinction between foreign and domestic carriers in assessing reviewability, neither examines closely the cases cited by petitioners which suggest that this distinction is immaterial if an invalid Board order is at issue. *American Airlines, Inc. v. CAB*, 348 F.2d 349 (D.C.Cir. 1965); *Pan American World Airways, Inc. v. CAB*, 380 F.2d 770 (2nd Cir. 1967), *aff'd by an equally divided Court, World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968). See discussion in Petition at 10-13. In these cases, Judges Burger and Hays found it unnecessary to distinguish between foreign and domestic carriers when allegations of unauthorized Board action had been made. Just as Judge Burger concluded in *American Airlines* that *Waterman* does not govern a situation where the action of the Board exceeds its statutory power, since in these circumstances no *valid* order can be submitted to the President, so petitioners submit that § 1006 does not bar review of the constitutionally defective Board action in the instant case.

## IV

Respondent SAA suggests that petitioners lack standing in this case. In fact, the matter of standing was fully briefed below and petitioners presented an unbroken line of authority holding that successful intervenors in CAB proceedings have standing to pursue their statutory rights as petitioners in the courts of appeals under the Act. See, e.g., *Pillai v. CAB*, 158 U.S.App.D.C. 239, 485 F.2d 1018 (D.C. Cir. 1973); *Aviation Consumers Action Project v. Civil Aeronautics Board*, ____ F.2d ____, 12 (CCH) AVI

L.R. ¶ 17.754 (D.C.Cir. Jan. 31, 1973); *Moss v. CAB*, 139 U.S.App.D.C. 150, 430 F.2d 891 (D.C.Cir. 1970); *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); *Western Airlines, Inc. v. CAB*, 190 F.2d 340 (9th Cir. 1951). Moreover, to suggest, as does respondent SAA, that petitioners should be denied standing for failing to meet an "injury in fact" test is untenable not only because that standard was not invoked against petitioners when they intervened before the Board, but because such a suggestion lacks case law support.[4]

## V

In addition to the question of procedural due process, petitioners have suggested that two other issues are presented by the Board's actions. First, petitioners submit that the Board is under a statutory duty to accept evidence of racial discrimination against black Americans on SAA's continuation flights in South Africa bookable in the United States or at SAA facilities serving such flights.[5]

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[4] Petitioners have, of course, maintained that they could meet the "injury in fact" test for standing should it be required since not only do members of the Congressional Black Caucus have specific legislative responsibilities regarding South Africa, but members of the other intervenor organizations have either faced discrimination on SAA flights or at SAA facilities in South Africa or declined to patronize SAA because of its discriminatory policies. While petitioners maintain that they possess clear statutory standing under the Federal Aviation Act, it is relevant to note that should they be unable to obtain statutory review in this case due to the barrier of § 1006, they may, under respondent's reading of the "injury in fact" test, be barred from presenting their claims in an original action. In this event, any review of the issues petitioners seek to raise would be precluded.

[5] While petitioners obviously do not purport to argue the merits of their statutory violation claim in this reply brief, it should be noted

(continued)

See statutory provisions cited in Petition at 5 and *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2nd Cir. 1956) and *United States v. City of Montgomery*, 201 F. Supp. 590 (M.D.Ala.N.D. 1962). In contesting petitioners' statutory duty argument, respondent SAA cites a series of cases for the proposition that agencies should not inquire into the internal affairs of foreign countries. These cases are beside the point;[6] in this case the agency did in fact conduct an inquiry, but in so doing denied petitioners their basic rights to procedural due process.

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[5] (continued)
that the CAB routinely inquires into the internal safety records of foreign airlines and has frequently defined foreign transportation to incorporate continuation flights in commercial proceedings: *See, e.g.*, Agreement adopted by the Traffic Conferences of the International Air Transport Association relating to fare matters, CAB Order 72-10-1 at 4; and Canadian Colonial Airways, Inc., Investigation, 2 CAB 752, 754 (1941). Finally, the Board has on occasion required foreign airlines to provide information on their domestic schedules. In one such case, In the matter of the Schedules of KLM Royal Dutch Airlines, CAB Order 74-11-150, the Board, in language equally applicable to the instant case, found that the requirement of such information could have no adverse effect upon the foreign airlines until a final decision was issued by the President.

[6] The principal case relied upon by the Respondents for their position, McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963), is easily distinguishable from the case at bar. McCulloch involved the judgment that the National Labor Relations Act was intended by Congress to affect only American seamen. The NLRB does not routinely regulate foreign carriers, as does the CAB. Moreover, McCulloch involved neither the scope of a factual investigation nor threatened constitutional interests. These distinctions apply with equal force to other cases cited by the Respondent SAA in its discussion of the statutory violations in this proceeding. (Brief of Respondent SAA at 15).

Petitioners also suggest that the question of a constitutional violation under the Fifth Amendment will be presented should the President grant SAA's route permit after a full review of a record including petitioners' evidence of racial discrimination.[7] The principal authority relied upon by respondent SAA to oppose this argument, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), is readily distinguishable from the instant case. Contrary to the function of the state regulatory body in *Moose Lodge*, the CAB is under an explicit statutory obligation to make findings as to racial discrimination in assessing the public interest. Further, as discussed, *supra*, petitioners submit that the CAB's statutory responsibilities extend to SAA's continuation flights in South Africa bookable in the United States.

Even in the absence of extensive argument on the merits of petitioners' statutory and constitutional contentions, they may hardly be characterized as frivolous.

[7] Until the President acts on a Board recommendation which comports with statutory requirements and procedural due process, no valid order is at issue in this case and consideration of a substantive Fifth Amendment violation is inappropriate.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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